

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

G.K. LAS VEGAS LIMITED PARTNERSHIP,  
Plaintiff,  
vs.  
SIMON PROPERTY GROUP, INC., et al.,  
Defendants.

Case No. 2:04-cv-01199-DAE-GWF

## ORDER

## **Defendant's Motion to Compel - #262**

This matter is before the Court on Defendant Simon Property Group, Inc.'s Motion to Compel Plaintiff to Complete Electronic Searches For Relevant Documents And to Comply With Other Discovery Undertakings (#262), filed on December 11, 2007; Plaintiffs' Opposition to Defendants' Motion to Compel (#282), filed January 15, 2008; and Defendant's Reply Memorandum in Support of Motion to Compel Plaintiff to Complete Electronic Searches for Relevant Documents and to Comply with Other Discovery Undertakings (#286), filed January 26, 2008. The Court conducted a hearing in this matter on February 19, 2008.

## BACKGROUND AND DISCUSSION

Defendant's Motion (#262) addresses a number of discovery issues that may require a motion to compel and court action. At this point, however, the only issue raised in Defendant's motion on which the parties have reached an impasse is whether Plaintiffs should be compelled to conduct electronic searches for relevant documents on the individual office computer hard drives of five present or former principal employees of Plaintiff: Craig Gordon, Peter Fine, Julie Morrison-King, Julie Rosten, and Leslie Shoji.

1       To place this motion in context, the Court notes, in a summary manner, that Plaintiffs' Third  
2 Amended Complaint (#279), filed on January 10, 2008, alleges that over a period of several years  
3 during the 1990's and into 2003, Defendants engaged in a pattern of fraudulent and coercive conduct  
4 which was intended to force Plaintiff GKLV to sell its 40% limited partnership interest in the Forum  
5 Development Limited Partnership ("FDLP") to Defendant Simon, the managing partner and majority  
6 owner. Plaintiffs further allege that Defendants made fraudulent statements concerning the actual value  
7 of the partnership property, the Forum Shoppes mall, and withheld and prevented Plaintiffs from  
8 obtaining accurate information so that Plaintiff would be misled into undervaluing the partnership. In  
9 January 2003, GKLV made an offer pursuant to the buy-sell agreement to sell its interest in the FDLP  
10 for \$173,966,650 or to purchase Simon's interest for \$240,733,350. *Third Amended Complaint* (#279),  
11 ¶ 190. On February 7, 2003, Simon elected to purchase GKLV's interest for \$173,966,650. Plaintiffs  
12 allege that the partnership actually had a value of approximately \$1 billion at the time Simon exercised  
13 its option to purchase GKLV's interest. Plaintiffs seek recovery of compensatory, punitive and treble  
14 damages and/or equitable relief against Defendants, including the rescission of the buyout agreement of  
15 GKLV's partnership interest and the imposition of a constructive trust. Plaintiffs' claims, therefore,  
16 exceed several hundreds of millions of dollars.

17       Due to an automatic stay order that was previously in effect, discovery did not commence in this  
18 case until late 2006. The parties thereafter exchanged discovery requests, including requests for  
19 production of documents, many of which are in electronic format. The parties expended several months  
20 negotiating agreement(s) regarding the production of electronic documents, including the relevant time  
21 period for which potentially relevant documents would be searched and produced, the search terms to  
22 be used to identify relevant documents, and the data bases, i.e., servers and/or individual computer hard  
23 drives of various principal employees/custodians that would be searched. There is no dispute that the  
24 five custodians at issue were identified as principal employees of Plaintiff during the relevant discovery  
25 period who may have received or generated relevant emails or other documents. Defendants contend  
26 that there was an agreement by the parties that as to specifically identified "custodians", each party  
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1 would perform electronic searches on their individual office computers.<sup>1</sup> According to Defendants, the  
 2 parties also agreed that the custodians' home or personal-use computers would not be subject to  
 3 electronic searches unless the custodians used them for work purposes and potentially stored relevant  
 4 documents on those computers. Defendants state that in compliance with this agreement, they  
 5 performed electronic searches on the office computers of their custodians, the number of which is  
 6 substantially greater than the custodians identified by Plaintiffs.

7 According to Defendants, Plaintiffs have produced very few emails or other electronic  
 8 documents regarding its principal employees, including the five custodians who are the subject of the  
 9 motion: Craig Gordon, Peter Fine, Julie Morrison-King, Julie Rosten, and Leslie Shoji. Defendants  
 10 allege that this is or may be due to the failure of Plaintiffs to preserve servers and computers and to  
 11 prevent the deletion of email from computer servers even after Plaintiffs were in anticipation of  
 12 litigation in this case. Defendants further allege that Plaintiffs have an inadequate back-up tape system  
 13 to preserve information that has been automatically deleted from their active computer servers.<sup>2</sup>

14 Defendants state that they only learned in September 2007, when they took the Rule 30(b)(6)  
 15 depositions of Plaintiff's PMK's regarding electronic production, that Plaintiffs did not, in fact, perform  
 16 electronic searches on the office computers of Craig Gordon, Peter Fine, Julie Morrison-King, Julie  
 17 Rosten, and Leslie Shoji. Instead, as confirmed by Plaintiffs in their Opposition (#282), Defendants  
 18 were subsequently informed that Plaintiffs' counsel had conferred with the foregoing custodians who  
 19 advise that they did not save or store email or other electronic documents on the hard drives of their  
 20 individual office computers. Based on the custodians' statements, Plaintiffs contend that there is no  
 21 reason to believe that any relevant emails or documents are located on their individual office computer  
 22 hard drives and electronic searches of those hard drives are unnecessary. As a compromise, Plaintiffs

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 24       <sup>1</sup>The Court uses the term "individual office computer", as opposed to "personal computer" or  
 25 "PC", to clearly distinguish between computers that were used by employees for work purposes from  
 personal computers that they used for non-work-related purposes.

26       <sup>2</sup>Each party accuses the other of "spoliation" of relevant evidence. These accusations have not  
 27 been substantiated by either party or made the subject of an actual motion for sanctions. The Court  
 28 makes no finding that "spoliation" has, in fact, occurred and this order is not to be read as containing  
 any such finding.

1 offered to perform the electronic searches if Defendants agree to pay for them. Plaintiffs advise that the  
2 cost for imaging the hard drives and performing the electronic searches is roughly \$20,000.

3 Defendants contend that the custodians' alleged statements do not justify Plaintiffs' failure and  
4 refusal to perform electronic searches of those hard drives. First, Defendants argue that Plaintiffs  
5 should be required to abide by their prior agreement to perform such searches. Second, Plaintiffs have  
6 not provided sworn affidavits by the employees that they did not save or store relevant documents on  
7 their individual office computer hard drives. Third, even if such affidavits were provided, the requests  
8 for relevant emails and documents go back many years and the custodians' statements that they never  
9 saved emails or other documents to their individual hard drives are inherently unreliable. Defendants  
10 also note that Plaintiffs' PMK regarding electronic production testified that the computers of all  
11 employees were configured so that documents saved to the commonly used "My Documents" directory  
12 were saved to the local PC hard drive. *See Motion (#262), p. 3; Exhibit "H", p. 142.* It was also  
13 standard practice to transfer saved documents from the old computers to the new ones when employees'  
14 office computers were replaced. *Id., Exhibit "H", pp. 120-121.* Defendants also contend that in  
15 regard to the few office computers of other persons that Plaintiffs did search, relevant documents were  
16 discovered thereon. Finally, Defendants argue that because Plaintiffs did not timely institute a  
17 "litigation hold" to prevent the deletion or destruction of relevant documents from their servers, the  
18 custodians' individual office computer hard drives may be the only existing location of relevant  
19 documents.

20 The Court has the discretion under Fed.R.Civ.Pro. 26(b)(2)(C) to limit or preclude discovery if  
21 the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the  
22 needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake  
23 in the litigation and the importance of the proposed discovery in resolving the issues. The Court does  
24 not read the cases cited by Defendants as establishing a *per se* rule that electronic searches of individual  
25 employees' office computer hard drives are always in order. Rather, those cases indicate, consistent  
26 with Rule 26, that such discovery is proper given the broad scope of relevancy and where there is a  
27 reasonable likelihood that relevant information may be found on the computer hard drives. *See e.g.*  
28 *Amsted Industries, Inc., 2002 WL 3184956 (N.D.Ill 2002) \*2; Wingnut Films, Ltd. v. Katja Motion*

1 *Pictures, Corp.*, 2007 WL 2758571 (C.D.Cal. 2007). As Plaintiffs also note, the Court has the  
2 discretion to apportion the costs and burdens of discovery in a manner that is fair and reasonable,  
3 including requiring the party requesting expensive electronic discovery to pay the cost of producing it.  
4 *Marens v. Carrabba's Italian Grill, Inc.*, 196 F.R.D. 35, 37-38 (D.Md. 2000); *Simon Property Group,*  
5 *L.P. v. mySimon, Inc.*, 194 F.R.D. 639, 641-642 (S.D. Ind. 2000); *Balboa Threadworks, Inc.*, 2006 WL  
6 763668 (D.Kan. 2006).

7 Notwithstanding the custodians' alleged statements, there is reason to believe that relevant  
8 documents may be contained on the hard drives of their individual office computers. The  
9 reasonableness of requiring that such searches be conducted is supported by the fact that documents  
10 which may have previously existed on the common servers are no longer available. The Court also  
11 agrees with Defendants that the employees' statements that they never saved documents to their  
12 individual office computer hard drives is not sufficiently reliable to justify a decision not to conduct  
13 such searches. Plaintiffs' Third Amended Complaint sets forth in substantial detail Plaintiffs'  
14 allegations that over a period of many years from the 1990's into 2003, they were denied access to  
15 partnership documents and information and were coerced into selling their limited partnership interest.  
16 Given these allegations, it is reasonable to infer that Plaintiffs are or were in possession of emails and  
17 other documents relating to those matters. Although neither party has provided the Court with detailed  
18 information regarding the foregoing custodians' involvement in the matters at issue, there appears to be  
19 no material dispute that they have knowledge of relevant information relating to Defendants' alleged  
20 conduct and/or whether Plaintiffs relied to their detriment on Defendants' alleged misrepresentations  
21 and concealment of information. The Court, therefore, concludes that Plaintiffs should be required to  
22 perform electronic searches on the individual office computer hard drives of Craig Gordon, Peter Fine,  
23 Julie Morrison-King, Julie Rosten, and Leslie Shoji.

24 The amount in controversy in this case is great. Both parties have substantial financial  
25 resources to litigate and bear the costs of discovery. The burden of electronic discovery imposed on  
26 Defendants is at least as great, if not greater, than the burden on Plaintiffs. Defendants, for their part,  
27 have complied with the arguable agreement that each party would perform electronic searches on their  
28 custodians' individual office computer hard drives. The Court therefore concludes that shifting the cost

1 of the subject searches to Defendants is not warranted and Plaintiffs should bear the cost of performing  
2 the searches.

3 Because the other issues raised in Defendant's motion are not yet ripe for motion or decision,  
4 the Court does not address them here. Accordingly,

5 **IT IS HEREBY ORDERED** that Defendant's Motion to Compel Plaintiff to Complete  
6 Electronic Searches For Relevant Documents And to Comply With Other Discovery Undertakings  
7 (#262) is **granted** as follows:

8 Plaintiffs shall forthwith perform electronic searches on the individual office computer hard  
9 drives of Craig Gordon, Peter Fine, Julie Morrison-King, Julie Rosten, and Leslie Shoji, pursuant to the  
10 electronic search protocol previously agreed to by the parties. Plaintiffs shall bear the expense for  
11 performing such searches.

12 DATED this 22nd day of February, 2008.

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14 GEORGE FOLEY, JR.  
15 United States Magistrate Judge

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